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TESLA, INC.

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 WAYNE SKILES,
13 Plaintiff,

14 v.

15 TESLA, INC., EXPERIAN INFORMATION
16 SOLUTIONS, INC., and SALESFORCE
VENTURES, LLC,

17 Defendants.
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Case No. 3:17-cv-05434-WHO

**DEFENDANT TESLA, INC.'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF ITS
MOTION TO COMPEL ARBITRATION AND
TO STAY PLAINTIFF'S FIRST AMENDED
COMPLAINT, OR, ALTERNATIVELY, TO
DISMISS PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Date: May 16, 2018
Time: 2:00 p.m.
Courtroom: 2, 17th Floor
Judge: Hon. William H. Orrick

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 16, 2018, at 2:00 p.m., or as soon thereafter as this matter may be heard before the Honorable William H. Orrick, defendant Tesla, Inc. (“Tesla”) will request that the Court consider Exhibits A, B, and C to the supporting Declaration of Jeffrey Gutkin (“Gutkin Declaration”) in adjudicating Tesla’s concurrently-filed Motion to Compel Arbitration and to Stay Plaintiff’s First Amended Complaint, or, Alternatively, to Dismiss Plaintiff’s First Amended Complaint (“Motion to Dismiss”). Specifically, Tesla will request that the Court take judicial notice of Exhibits A, B, and C to the Gutkin Declaration under Federal Rule of Evidence 201. This request is based on the instant Request and supporting memorandum of points and authorities, Tesla’s Motion to Dismiss and supporting memorandum of points and authorities, the Gutkin Declaration and its exhibits, all pleadings and papers on file in this matter, and such other matters as may be presented to this Court at the time of the hearing.

STATEMENT OF RELIEF SOUGHT

Tesla seeks an order stating that Exhibits A, B, and C to the Gutkin Declaration are properly before the Court on Tesla’s Motion to Dismiss because they are subject to judicial notice.

STATEMENT OF ISSUES TO BE DECIDED

Should the Court take judicial notice of Exhibits A, B, and C to the Gutkin Declaration in ruling on Tesla’s Motion to Dismiss?

MEMORANDUM OF POINTS AND AUTHORITIES

I. DOCUMENTS SUBJECT TO THIS REQUEST

Tesla requests that the Court take judicial notice of the following documents:

1. Gutkin Declaration, Exhibit A: Experian Marketing Services’ (“Experian’s”) Mosaic USA Product Sheet, “Mosaic USA, Your Customer Segmentation Solution for Consistent Cross-Channel Marketing,” (“Mosaic USA Product Sheet”) *available at* <https://www.experian.com/assets/marketing-services/product-sheets/mosaic-usa.pdf> and referenced in the First Amended Complaint (“FAC”) at ¶ 30 n.3.

2. Gutkin Declaration, Exhibit B: Experian’s Ask Judy Column, “Ask Judy: Data Compliance Corner,” *available at* <https://www.experian.com/marketing-services/ask-judy.html>.

3. Gutkin Declaration, Exhibit C: Experian’s Mosaic USA Consumer Lifestyle Segmentation Page, “Target your audiences with precision and insight through Mosaic USA,” (“Consumer Lifestyle Segmentation Page”) *available at* <http://www.experian.com/marketing-services/consumer-segmentation.html> and referenced in the FAC at ¶ 87 n.8.

II. LEGAL STANDARD

“[C]ourts **must** consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (emphasis added); *accord, e.g., Skilstaf, Inc. v. CVS Caremark Corp.*, No. 09-2514, 2010 WL 199717, at *2 (N.D. Cal. Jan. 13, 2010) (same).

Under the doctrine of incorporation by reference, a court may consider “not only documents attached to the complaint, but also documents whose contents are alleged therein, provided the complaint ‘necessarily relies’ on the documents or contents thereof, and the documents’ authenticity and relevance are uncontested.” *Sharp v. Nationstar Mortg., LLC*, No. 14-CV-00831-LHK, 2015 WL 106844, at *3 (N.D. Cal. Jan. 7, 2015) (quoting *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010)). A document is “incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document **forms the basis** of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (emphasis added). Moreover, where a document has been incorporated by reference, the Court “‘may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).’” *Id.* at 908. The purpose of this doctrine is “to prevent plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting [references] to documents upon which their claims are based.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (alterations and internal quotations omitted).

Additionally, when ruling on a motion to dismiss, a court may consider any matter that is subject to judicial notice. *Tellabs*, 551 U.S. at 322; *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Specifically, on a party’s request, the court **must** take judicial notice of facts “not subject to reasonable dispute” that are either (1) “generally known within the trial court’s territorial jurisdiction”; or (2) “can be accurately and readily determined from sources whose accuracy cannot

reasonably be questioned.” Fed. R. Evid. 201(b), (c)(2). Courts routinely take judicial notice of website contents. *See, e.g., Frances Kenny Family Tr. v. World Savs. Bank FSB*, No. 04-3724, 2005 WL 106792, at *1 n.1 (N.D. Cal. Jan. 19, 2005) (taking judicial notice of content on plaintiffs’ website); *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (district court abused discretion by denying party’s request for judicial notice of information on government agency’s website); *see also infra*, Section III. B (collecting additional cases).

III. ARGUMENT

A. The Complaint Incorporates by Reference Both the Mosaic USA Product Sheet and Consumer Lifestyle Segmentation Page, and They Should Be Considered for Their Truth.

Plaintiff relies on the (1) Mosaic USA Product Sheet (Gutkin Decl. ¶ 2, Ex. A), and (2) Consumer Lifestyle Segmentation Page (Gutkin Decl. ¶ 4, Ex. C), to support his claims, alleging that “Experian . . . provided Tesla with an Experian ‘Mosaic’ score based on Plaintiff’s personal information, such as property characteristics, and summarized credit and automotive data.” (FAC ¶ 30 n.3 (citing <https://www.experian.com/assets/marketing-services/product-sheets/mosaic-usa.pdf>.) Plaintiff uses this allegation to support his assertion that “[t]he ‘Mosaic’ score provided by Experian to Tesla falls within the [FCRA] definition of a ‘consumer report’” because, “[i]n generating [the score] for Tesla, Experian took into consideration factors bearing on Plaintiff’s credit worthiness, personal characteristics, and mode of living, among other things.” (*Id.* ¶¶ 86-87, 87 n.8 (citing <http://www.experian.com/marketing-services/consumer-segmentation.html>).) Because both the Product Sheet and Consumer Lifestyle Segmentation Page are cited in support of an allegation that is necessary to state a FCRA claim, they “form[] the basis of the plaintiff’s claim” and are therefore incorporated by reference. *Sharp*, 2015 WL 106844 at *4 (quoting *Ritchie*, 342 F.3d at 908); *see also Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 880, 884-85 & n.2 (N.D. Cal. 2015) (considering YouTube’s Terms of Service cited in the complaint as incorporated by reference in granting motion to dismiss); *Casper Sleep, Inc. v. Jack Mitcham and Mattress Nerd, LLC*, No. 16-3224, 2016 WL 4574388, at *2 n.2 (S.D.N.Y. Sept. 1, 2016) (considering website excerpted in and linked from complaint as incorporated by reference in granting in part motion to dismiss); *Perkins v. LinkedIn*

1 *Corp.*, 53 F. Supp. 3d 1190, 1205 (N.D. Cal. 2014) (considering LinkedIn’s online Help Page cited in
 2 complaint in granting in part motion to dismiss).

3 Moreover, the FAC’s purported description of the Mosaic Score based on the Mosaic USA
 4 Product Sheet and Consumer Lifestyle Segmentation Page is inaccurate. The Mosaic Score is not, as
 5 Plaintiff claims, based on “Plaintiff’s personal information” or “personal characteristics.” (FAC ¶¶ 30,
 6 87.) Rather, it is a “*household-based* consumer lifestyle segmentation system that classifies all U.S.
 7 households and neighborhoods.” (Gutkin Decl., Ex. A at 2 (emphasis added).) The Court should
 8 consider the Mosaic USA Product Sheet and Consumer Lifestyle Segmentation Page in full to prevent
 9 Plaintiff from profiting from his inaccurate and incomplete description of the contents of the
 10 documents. *See Swartz*, 476 F.3d at 763; *Cozzarelli v. Inspire Pharm., Inc.*, 549 F.3d 618, 625 (4th
 11 Cir. 2008) (considering such documents and affirming dismissal of complaint where full documents
 12 contradicted complaint’s allegations); *Perkins*, 53 F. Supp. 3d at 1201 n.5 (considering blogpost that
 13 plaintiffs “selectively quote[d]” as incorporated by reference); *In re Silicon Graphics, Inc. Sec. Litig.*,
 14 970 F. Supp. 746, 758-59 (N.D. Cal. 1997) (documents referenced in the complaint and central to its
 15 claims should be considered in their entirety to ensure plaintiffs have not “quoted only selected and
 16 misleading portions of [them]”).

17 **B. The Court Should Take Judicial Notice of the Ask Judy Column.**

18 The Ask Judy Column (Gutkin Decl. ¶ 3, Ex. B) is subject to judicial notice because it is
 19 publicly posted on Experian Marketing Services’ website. Courts frequently take judicial notice of
 20 websites to show that certain information is publicly available. *See, e.g., In re Iso Ray, Inc. Sec. Litig.*,
 21 189 F. Supp. 3d 1057, 1066 (E.D. Wash. 2016) (“courts may take judicial notice of information posted
 22 on publicly available websites for the fact that the information is available to the market”); *Makaeff v.*
 23 *Trump Univ., LLC*, 715 F.3d 254, 259 n.2 (9th Cir. 2013) (taking judicial notice of webpages to
 24 determine what information was in public realm); *Shen Wei (USA) Inc. v. Sempermed, Inc.*, No. 05-
 25 6004, 2007 WL 328846, at *3 n.3 (N.D. Ill. Jan. 30, 2007) (“For purposes of a 12(b)(6) motion to
 26 dismiss, a court may take judicial notice of information publicly announced on a party’s website, so
 27 long as the website’s authenticity is not in dispute and it is capable of accurate and ready
 28

determination.”) (citation omitted).¹

Here, Experian’s Ask Judy Column is subject to judicial notice. It is capable of accurate and ready determination by visiting Experian’s website. *See* Gutkin Decl. ¶ 3; *Opperman v. Kong Techs.*, No. 13-cv-00453-JST, 2017 U.S. Dist. LEXIS 116333, at *18 (N.D. Cal. Jul. 25, 2017). Moreover, Tesla has offered the document for consideration for a permissible purpose: to show what Experian says to its customers regarding its expectations for their use of its marketing products (i.e., what information was publicly available to Experian customers like Tesla). *See Iso Ray*, 189 F. Supp. 3d at 1066; *Makaeff*, 715 F.3d at 259; *Shen Wei*, 2007 WL 328846, at *3 n.3. The Court should therefore consider it in deciding Tesla’s Motion to Dismiss.

IV. CONCLUSION

For the reasons stated above, this Court should grant Tesla’s request for judicial notice of Exhibits A, B, and C to the Gutkin Declaration.

Dated: January 24, 2018

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/s/ Michael G. Rhodes

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¹ *See also Kinderstart.com, LLC v. Google, Inc.*, No. 06-2057 JF (RS), 2007 WL 831806, at *21 n.20 (N.D. Cal. Mar. 16, 2007) (taking judicial notice of pages on defendant Google’s website to grant motion to dismiss); *Ross v. O’Neal*, No. 2:11-cv-06124-JHN-Ex, 2011 WL 5041967, at *1 (C.D. Cal. Oct. 17, 2011) (taking judicial notice of records obtained from the NBA’s official website, www.nba.com, to grant defendant basketball player’s motion to dismiss); *Opperman v. Path, Inc.*, No. 13-cv-00453-JST, 2016 WL 4719263, at *2 n.3 (N.D. Cal. Sept. 8, 2016) (taking judicial notice of Yelp’s Privacy Policy posted to its website); *Frances Kenny*, 2005 WL 106792, at *1 (taking judicial notice of pages on plaintiffs’ website); *Perkins*, 53 F. Supp. 3d at 1205 (taking judicial notice of LinkedIn’s Help Page); *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965-66 (C.D. Cal. 2005) (taking judicial notice of Amazon.com webpages).